EMPEREE WOOD PRODUCTS SDN BHD

v.

BUSINESS FLAIR SDN BHD

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[APPEAL NO: 12-10-97]
7 NOVEMBER 1997

CIVIL PROCEDURE: *Affidavits - Affidavit containing statement of information and belief without disclosing sources and grounds for such information and belief - Whether affidavit can be relied on - Subordinate Courts Rules 1980, O. 25 r. 26(2) - Attachment - Attachment before judgment - Attachment of goods stored at jetty - Debtors Act 1957, s. 19(1)(c) - Exercise of judicial discretion*

The plaintiff had earlier filed an action against the defendant claiming for certain kiln drying charges due to the plaintiff and had obtained an *ex parte* order for attachment before judgment in respect of the defendant's timber that was stored at the jetty at Port Klang. The notice of application of the plaintiff for the said order for attachment before judgment was supported by the affidavit of one Yap Ah Pooy which merely averred that to the best of his belief the timber would be exported and in the circumstances the deponent believed that the defendant was trying to remove its property with the intention of obstructing or delaying the execution of any judgment that might be made against it. No sources or grounds for such belief were stated in the affidavit. The defendant then applied to set aside the said order of attachment before judgment and this was granted by the Sessions Court.

The present case was an appeal by the plaintiff against the decision of the Sessions Court setting aside the order of attachment before judgment.

Held:

[1] As required under O. 25 r. 26(2) of the Subordinate Court Rules 1980, when a deponent makes a statement based on his information and belief, he must state the ground of that information and belief. Failure to do so will make the averment in the affidavit worthless and unreliable.

[2] The requirements of s. 19(1)(c) of the Debtors Act 1957 are stringent and must be strictly complied with. To succeed in an application under the said section, a plaintiff must satisfy the court of two things by evidence on oath. Firstly, he must have a good cause of action and, secondly, the defendant, with intent to obstruct or delay the execution of any judgment, has removed or is about to remove, or has concealed or is concealing or making away with, or handing over to others any of his movable or immovable property.

[3] Section 19(1)(c) of the Debtors Act 1957 does not debar a person from dealing with his property merely because a suit has been filed against him. There must be additional circumstances before the court can be satisfied that an intention to obstruct or delay the execution of any judgment exists to warrant the grant of an order for attachment before judgment.

[4] The plaintiff's case as evidenced by the affidavit of Yap Ah Pooy did not show any evidence of intention to obstruct or delay on the part of the defendant. The Sessions Court in setting aside the attachment order obtained by the plaintiff had rightly appreciated the facts and applied the true principles. This was a sound exercise of judicial discretion. The mere fact that this court might have taken a different view was not a sufficient ground for interference with that discretion.

[Appeal dismissed with costs.]

Cases referred to:

Datuk Abu Mansor Mohd Nasir v. Bank Kerjasama Rakyat Malaysia Bhd & Anor [1982] ***(refd)***

Hari Singh v. Sundaramal [1965] 2 MLJ 174 ***(refd)***

Kepong Prospecting Ltd v. Schmidt [1962] 28 MLJ 375 ***(refd)***

Madan Theatres Ltd. v. Hari Das ***(refd)***

Nanyang Development (1966) Sdn Bhd v. Malaysian Armed Forces Co-operative Housing Society Ltd [1972] 2 MLJ 149 ***(refd)***

Quartz Hill Consolidated Gold Mining Co v. Beall Jessel MR

Legislation referred to:

Debtors Act 1957, s. 19(1)(c)

Subordinate Courts Rules 1980, O. 25 r. 26(2)

For the plaintiff - Muker; M/s Muker & Assoc

For the defendant - KH Yeo; M/s Azam-Malik & Soh

Reported by Ling Hea Hoon

JUDGMENT

Faiza Tamby J:

Background

On 9 October 1996 the plaintiff filed an action against the defendant claiming a sum of RM29,208.23 being the alleged kiln drying charges due to the plaintiff. Particulars of the sum claimed are set out in para. 1 of the statement of claim (See p. 6-7 of the Appeal Record (A/R)).

On the same day by a Notice of application, the plaintiff moved the court and obtained *ex parte* an order for attachment before judgment in respect of the defendants timber that was stored at Jetty Services Sdn Bhd at Port Klang (see p. 10 A/R). This application was supported by the affidavit of one Yap Ah Pooy @ Yap Ah Ling affirmed on 8 October 1996 (See pp. 12-15 A/R).

Although the plaintiff in his application for attachment before judgment had asked for a blanket order it can be seen that the court had restricted the order up to the amount of plaintiff's claim of RM29,208.23.

By an application dated 23 November 1996 (see p. 46 A/R) supported by the affidavit of Khoo Tack Seng, the manager of the defendant company affirmed on 21 November 1996 (see pp. 47-59 A/R) the defendant applied to set aside the order of attachment before judgment obtained by the plaintiff on 9 November 1996. The court after hearing submissions by counsels for both parties set aside the said *ex parte* order. The plaintiff now appeals against the decision of the court setting aside the order of attachment before judgment.

Ground Of The Plaintiffs Application

Through the affidavit of Yap Ah Pooy in para. 14 thereof (p. 15 A/R) the plaintiff avers that to the best of his belief the timber will be exported. In those circumstances the deponent verily believes that the defendant is trying to remove its (defendant's) property with the intention of obstructing or delaying the execution of any judgment that may be made against it.

The averment in para. 14 of the affidavit of Yap Ah Pooy offends O. 25 r. 26(2) Subordinate Court Rules 1980 (SCR) as no sources or grounds for such belief are stated; Order 26 r. 26(2) SCR reads:

> 26(1)...
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

In short that averment on behalf of the plaintiff which was pivotal in the court granting the order sought by the plaintiff is worthless and not to be relied upon. The same is not supported by any other evidence adduced by the plaintiff at all.

In the case of *Hari Singh v. Sundaramal* [1965] 2 MLJ p. 174 it was decided that:

> when knowledge and information and belief are alleged at the same time in an affidavit it is necessary for the defendant to state how much of the allegation is base on personal knowledge and how much on information and belief.

At p. 175 it was stated:

> However, the point made by Mr. Dharmananda is that the order was made on insufficient or no evidence at all as the facts deposed to in the affidavit of the plaintiff are made on information and belief without disclosing the source of the information as required under rr. 3 of O. 38 of the Rules of the Supreme Court.

In the case of *In re J.L. Young Manufacturing Co. Ltd* on an appeal from an order refusing an applicant's claim to rank as a debenture holder based on evidence which consisted mainly of affidavits containing statements on "information and belief", Lord Alverstone CJ said:

> In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice that in several instances the deponents make statements on their 'information and belief' without saying what the source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on 'information and belief' ought not be looked at all, not only unless the court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice.

Supporting this judgment Rigby LJ said:

> I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general – that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief.

In the case of *Quartz Hill Consolidated Gold Mining Company v. Beall Jessel MR* in allowing an appeal from an order on an interlocutory injunction in a libel action said:

> Now, in this instance, the only witness for the plaintiff's is their secretary, who says not that the circular is untrue but that the statements in the circular are to the best of his knowledge, information, and belief are untrue. He does not shew that he has any knowledge at all on the subject of these statements. He probably as secretary has some knowledge about them, but he does not shew it; and where an affidavit is made upon information and belief the rules of the court require that the deponent should state what are the grounds of his information and belief, and that he does not do, he only says that they are untrue to the best of his knowledge, information, and belief, not saying what the best of his knowledge is, and it may be nothing at all. There is, therefore, no evidence as to the untruth of the allegation in the circular.

In the case of *Madan Theatres Ltd v. Hari Das,* in setting aside an order of attachment before judgment, the appeal court held that:

> the affirmation attached to the affidavit is wholly insufficient. It does not give any details as to what portion of the affidavit was based upon the personal knowledge of the deponent and what allegations were founded upon information and whether he believed it to be true.

It would therefore appear when knowledge and information and belief are alleged at the same time, it is necessary for the deponent to state how much of the allegation is based on personal knowledge and how much on information and belief.

The Law

The requirements of s. 19(1)(c) of Debtors Act 1957 are stringent and must be strictly complied with. In order to succeed under such an application the plaintiff must satisfy the court two things by evidence on oath that:

(i) it ie, (plaintiff) has a good cause of action; and

(ii) the defendant with intent to obstruct or delay the execution of any judgment which has been or may be made against him has removed or about to remove or has concealed, or is concealing, or making away with, or handling over to others, any of his moveable or immoveable property (At p. 6 B/A) then the court may order that the property of the defendant, or any part thereof, be forthwith seized or attached by the appropriate officer as a pledge or surety to answer the just demand of the plaintiff, until the trial of the action and satisfaction of any judgment that may be made against the defendant but such order shall not constitute the plaintiff a secured creditor if the defendant is adjudicated bankrupt.

In *Kepong Prospecting Ltd v. Schmidt* [1962] 28 MLJ 375 @ 377 the court stated:

> From the wording of the section it is clear that the applicant for such an order must satisfy the court by evidence on oath of two things. The first is that he has a "good cause of action". The second is that the defendant "with intent to obstruct or delay the execution of any judgment" has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, may of his movable or immovable property.
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> For myself, I do not find it necessary to discuss the first of these requirements at length. The truth is that here there is not a scrap of "evidence on oath" that the plaintiff has any cause of action at all, far less a "good cause of action", whatever precisely these words may mean. It is irrelevant to speculate as to what the position would have been had the proceedings been commenced by way of plaint under the old Civil Procedure Code. They were commenced by writ under the existing procedure and at no stage has anything been verified on oath except what his claim is. This may appear to be a somewhat technical and cursory way of disposing of the point but in view of other conclusions to which I have been compelled I do not propose to take it any further.
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> With regard to the second requirement of the section, there is here no question of concealing property or anything of that sort. It is freely admitted that the defendant company has handed a great deal of its property over to others, in that it has handed over a great deal of its money over to its shareholders who are of course different persons from itself. The real question is whether there was any evidence on oath that handing over was done "with intent to obstruct or delay" any judgment the plaintiff might obtain.
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> ... As was said by Sir Norman Macleod in the case of *Nowroji Pudumjee Siradar v. The Deccan Bank Ltd*. in considering a similar provision in the law of India:
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> A man is not debarred from dealing with his property because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings he sells some of his property, that would be at once a sufficient ground to satisfy the court that he is disposing of his property with intent to defraud the plaintiff. Clearly there must be additional circumstances before the court can be satisfied that such an intention exists.

The plaintiff's manager in his affidavit has merely stated that the timber sent to M/s. Jetty Services Sdn Bhd would be exported. Nothing more is said or avered to with regard to these transactions. This is fatal to the plaintiff's application for the *ex parte* order in view of the fact that evidence of intention to obstruct or delay on the part of the defendant could only be inferred or

drawn from these exports. The plaintiff has adduced no evidence as to the nature or purpose of these exports. From the affidavit of the manager of the defendant, Khoo Tack Sang affirmed on 21 November 1996 (See pp. 9, 10 and 14 and see pp. 62-64 of A/R) it is clear that the timber was sent to M/s. Jetty Services Sdn Bhd in the normal course of the defendants business. No alleged intention to obstruct or delay can be drawn on the defendants part merely from the fact that timber that was sent to M/s. Services Sdn Bhd. would be exported.

It is trite law that s. 19(1)(c) of the Debtors Act 1957 does not debar a man from dealing with his property merely became a suit has been filed against him.

In *Datuk Abu Mansor b. Mohd Nasir v. Bank Kerjasama Rakyat Malaysia Bhd. & Anor* [1982] it is stated:

> In this appeal, we agree with the legal proposition that s. 19(1)(c) Debtors Ordinance 1957 does not debar a man from dealing with his property merely because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings, he sells some of property, that would be at once a sufficient ground to satisfy the court that he is disposing of his property with intent to defraud the plaintiff. There must be additional circumstances before the court can be satisfied that such an intention exists. (See *Kepong Prospecting Ltd v. Schmidt*).

Fact In this Case

The gravamen of the plaintiff's complaint as set out in para. 14 of the affidavit in support of Yap Ah Pooy @ Yap Ah Ling affirmed on 8 October 1996 (see pp. 12 -15 of A/R) does not show any evidence of intention to obstruct or delay on the part of the defendant.

The affidavit of Khoo Tack Seng, the manager of the defendant, affirmed on 21 November 1996 (see pp. 61-72 of A/R) clearly sets out:

(i) that the defendant was not indebted to the plaintiff in the sum of RM29,208.23 (see para 11 and 12 @ pp. 63 and 64 A/R) para 28 @ p. 69 A/R and para 31 (f) (see p. 71 A/R)

(ii) that the plaintiff had levied attachment on the goods whose value far exceeded the sum due to the plaintiff if any (see para 20 @ p. 66 A/R).

(iii) that the defendant was exporting timber to overseas buyers through M/s Jetty Services Sdn. Bhd. (see para 21 and 22 @ 67 of A/R); and

(iv) that the defendant is financially sound and has the ability to meet its trade debts as and when they arise (see para 29 & 30 @ pp. 69 and 70 of A/R).

Discretion

The learned Session's Judge in setting aside the *ex parte* order obtained by the plaintiff had exercise her discretion and in so doing rightly appreciated the facts and applied to those facts the true principles, that was a sound exercise of judicial discretion.

In *Nanyang Development (1966) Sdn Bhd v. Malaysian Armed Forces Co-operative Housing Society Ltd* [1972] 2 MLJ p. 149 @ p. 154 it was stated:

> If the learned judge rightly appreciated the facts and applied to those facts the true principles, that was a sound exercise of judicial direction. The mere fact that this court might have taken a different view is not a sufficient ground for interference with that discretion. If any authority is required for that proposition it is to be found in the case of *Durga Das Das v. Nalin Chandra*, a case on which the defendants themselves relying in support of their appeal. Even in the case of *Bishamberdas & Co. v. Sachoomal Kotoomal*, another case on which the appellants seek to rely, it was held that where the lower court has correctly stated and appreciated the most material facts in the case, and has not misunderstood or misapplied the law, and has deliberately exercised a discretion entrusted to it by law, the appellate court will not interfere. The same principle is to be found in *Golding v. Wharton Saltworks Company Watson v. Rodwell*, and *Evans v. Bartlam.* To use the words of Jenkins, LJ in *Grimshaw v. Dunbar*, "did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right consideration?" I do not think so. This court, therefore, cannot interfere.

Conclusion

In this case, it is my view that the learned Sessions Judge had correctly appreciated the most material facts of the case and has not misunderstood or misapplied the law, and had deliberately exercised a discretion entrusted to her by law. I do not intend to interfere with her exercise of discretion. Therefore the appeal is dismissed with costs.